TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 22, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record from D. C. U. S., Western District of South Carolina	1	1
Stipulation as to contents of record	1	1
Complaint	2	1
Answer	6	4
Agreed statement of the evidence	6	4
Plaintiff-Appellee's Witnesses:		
Mrs. James H. Halliday:		
Direct examination	7	4
Cross-examination	9	6
J. M. Broyles:		
Direct examination	20	11
Cross-examination	21	12
Redirect examination	22	14
Henry Jackson:		
Direct examination	23	14
Cross-examination	24	15

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—7102

	Original	Print
Record from D. C. U. S., Western District of South Carolina—Continued		
Agreed statement of the evidence—Continued		
Plaintiff-Appellee's Witnesses—Continued		
B. M. Stevenson:		
Direct examination	25	15
Cross-examination	26	16
S. E. Leverett:		
Direct examination	26	16
Cross-examination	27	17
E. H. Halliday:		
Direct examination	27	17
Cross-examination	28	18
Dr. J. N. Land:		
Direct examination	35	22
Cross-examination	37	23
Redirect examination	42	26
Crymes W. Halliday:		
Direct examination	43	26
Defendant-Appellant's Witnesses:		
Dr. C. H. Young:		
Direct examination	49	30
Cross-examination	54	32
Redirect examination	56	34
Recross-examination	57	34
J. W. Dickson:		
Direct examination	57	34
Cross-examination	58	35
Redirect examination	58	35
Recross-examination	58	35
Plaintiff-Appellee's Exhibits:		
1—Reports of examinations of plaintiff by Government medical examiners, etc.	29	18
2—Records of Adjutant General's Office relative to plaintiff's service history	44	27
Defendant-Appellant's Exhibits:		
1 and 2—Plaintiff's application for life insurance with attached Medical Examiner's Report	50	31
3—Letter from plaintiff to Bureau of War Risk Insurance, June 18, 1920	59	35
Defendant's motion for directed verdict	59	36
Charge to jury	60	36
Verdict	72	43
Stipulation as to the statement of the evidence	73	43
Order overruling motion for a new trial	74	44
Judgment	77	45
Notice of appeal	79	47
Appellant's statement of points on appeal	80	47
Order extending time for docketing and filing record on appeal	82	48
Clerk's certificate of record (omitted in printing)	82	

	Original	Print
Proceedings in U. S. C. C. A., Fourth Circuit	84	49
Docket entries	84	49
Opinion, Dobie, J.	87	51
Judgment	97	58
Petition of appellee for rehearing	98	59
Order denying rehearing	106	64
Order staying mandate pending application for writ of certiorari	107	65
Order authorizing Clerk to use original transcript of record in making record for use on application for writ of certiorari	107	65
Clerk's certificate (omitted in printing)	108	
Order allowing certiorari	109	66
Order granting motion for leave to proceed in forma pauperis	110	66

[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD

It is hereby stipulated by and between the undersigned counsel for the appellant and appellee herein, that the following shall constitute the record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the judgment entered herein in favor of the appellee on April 18, 1940:

1. This Stipulation.
2. Complaint.
3. Answer.
4. Agreed Statement of the Evidence and the originals of all of the exhibits mentioned therein.
5. Court's Charge to the Jury.
6. Stipulation as to the Statement of the evidence.
7. Order Overruling Motion for a New Trial.
8. Order for Judgment.
9. Notice of Appeal.
10. Appellant's Statement of Points on Appeal.
11. Order Extending Time for Docketing and Filing Record on Appeal.
12. Clerk's Certificate of Record.

Signed and agreed upon this 2nd day of October 1940.

O. H. Doyle, United States Attorney, Counsel for Appellant. R. K. Wise, Counsel for Appellee.

[fol. 2] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

JAMES H. HALLIDAY, a Person Non Compos Mentis by His Committee, Annie Halliday, Plaintiff

v.

UNITED STATES, Defendant

COMPLAINT—Filed November 20, 1936

The plaintiff respectfully shows to the Court and alleges:

1. That the plaintiff is now and at the times hereinafter mentioned a resident of Anderson County, in the State of

South Carolina, and within the Western District of South Carolina.

2. That heretofore, to-wit: on the 23rd day of June, 1918, James H. Halliday was drafted in the Army of the United States of America at Honea Path, South Carolina, and served in said Army as a private, until he was honorably discharged on the 2nd day of April, 1919.

3. That the plaintiff further alleges that while serving in the Army of the United States of America he applied for and had issued to him by the Bureau of War Risk Insurance of the Treasury Department of the United States of America a contract of War Risk Insurance in the sum of Ten Thousand ($10,000) Dollars, under the terms of which he [fol. 3] was entitled, in the event of total and permanent disability and unable to follow continuously any substantially gainful occupation and it was reasonably certain that that condition would continue through veteran's life in the same or a greater degree, to have the premiums waived and to receive from the United States, or some of its departments or bureaus, the sum of Fifty Seven and 50/100 ($57.50) Dollars per month during the time of said disability.

4. That the plaintiff is informed and believes that the premiums of said insurance were deducted from the Army pay of the above named plaintiff and paid to the Bureau of War Risk Insurance until the time of his discharge on the 2nd day of April, 1919.

5. That while this plaintiff was serving in the Army of the United States he became totally and permanently disabled by reason of diseases and infirmities so that from the 2nd day of April, 1919, he was totally and permanently disabled to the extent contemplated by the contract of War Risk Insurance under the Acts of Congress and regulations relating thereto and that on account of said disability, no premiums were due to have been paid on the said contract of insurance from the date of his disability, and that the [fol. 4] said contract was at that time and is at this time in full force and effect.

6. That the plaintiff is informed and believes that on account of matters hereinabove stated the United States

of America is due and owing to him the sum of Fifty Seven and 50/100 ($57.50) Dollars per month, so long as the plaintiff remains permanently and totally disabled in accordance with the terms of contract of war risk insurance and regulations pertaining thereto.

7. That heretofore to-wit: on —, and long prior thereto, the said James H. Halliday was rated incompetent by the Veterans Administration, and was, and still is, an incompetent person; that demand was duly made of the defendant in writing for payment of benefits under said contract of insurance, which claim used words showing an intention to claim such insurance benefits, but the defendant has failed to pay the same, and on —, a final disagreement was given by the Administrator's Board of Appeals.

8. That a disagreement exists between the plaintiff and the Veterans Administration as to payment of said insurance according to the terms of said contract.

[fol. 5] 9. That the Veterans Administration having declined to pay plaintiff's claim, it became necessary for him to employ an attorney to bring this action for the collection of said claim, and said attorney is entitled to a reasonable fee for his services.

Wherefore: Plaintiff prays judgment against the United States of America.

First, for the sum of Fifty Seven and 50/100 ($57.50) Dollars per month to the plaintiff from the 2nd day of April, 1919, to date.

Second, for adjudication of his right to future payments of Fifty Seven and 50/100 ($57.50) Dollars per month in accordance with the terms of the said contract of War Risk Insurance.

Third, for a reasonable fee to be fixed for the attorney for the prosecution of this action.

Fourth, for the costs of this action, and for such other and further relief as this Court may deem just in the premises.

R. K. Wise, Attorney for Plaintiff.

(Verification omitted.)

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 27, 1937

Now comes the defendant, United States of America, by its attorney, C. C. Wyche, Esq., United States Attorney for the Western District of South Carolina, and for answer to plaintiff's complaint, respectfully shows the court that it has not sufficient information upon which to form a belief as to the truth of all the allegations and statements contained in the plaintiff's complaint, and therefore denies each and every allegation contained therein.

Wherefore, the defendant prays that this action be dismissed with costs.

(Signed) C. C. Wyche, United States Attorney.

Verified by O. H. Doyle, Assistant United States Attorney, January 18, 1937.

Service accepted January 19, 1937.

IN UNITED STATES DISTRICT COURT

Agreed Statement of the Evidence

Tried before the Honorable Alva M. Lumpkin, Judge, and a jury, at Anderson, South Carolina, beginning November 30, 1939. R. K. Wise appearing as attorney for the plaintiff, and O. H. Doyle and E. P. Riley, for the Government.

[fol. 7] The following jurisdictional facts are stipulated:

Claim filed June 22, 1931;

Claim denied July 23, 1935;

Notice of denial mailed August 3, 1935;

Appealed to Board of Veterans' Appeals December 21, 1935;

Finally denied by Board November 18, 1936;

Suit was filed November 20, 1936.

MRS. JAMES H. HALLIDAY, a witness for the plaintiff testified:

I am the committee for my husband, Mr. James H. Halliday, having been appointed on December 9, 1935. I first

met him in 1913, when I was teaching school at Mountain Creek in Anderson County. We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia, and stayed about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work, in 1924.

[fol. 8] With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. That has continued to be true up to the present time. He could not work all day. He worked maybe an hour or two.

With reference to his mental condition, he was suspicious and all that, you know. He was suspicious of everybody. That has been true since his discharge from service. He is suspicious of his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, he says he would rather die than go there. He has been [fol. 9] in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen.

Q. Has this condition improved any since you were married?

A. None whatever.

Q. Is it any worse?

A. Well, he is harder to control now than he was at first.

Q. Well, when he wants to do anything, what do you have to do?

A. Just let him have his way.

Q. You don't try to talk him out of it?

A. I don't try to persuade him or anything.

Q. Now, that has been true ever since you have been married?

A. Yes, sir.

We have four children. I first knew that I could bring suit on this policy about 1930.

His doctors have been the Government doctors and Dr. Land here in Anderson. Dr. Land is our family physician.

I work on the farm; I cannot plow but I have done everything else.

Cross-examination of Mrs. Halliday:

Between the time of my husband's discharge and our marriage in 1921, I was teaching school and living at home with my mother, and Mr. Halliday was in the hospital dur- [fol. 10] ing that time. I saw him several times between the date of his discharge and our marriage. He came to see me and he came from his home at Iva, which is about 18 miles from where I was living, or else he came from the hospital where he was taking treatment. He came with his brother who visited another teacher. They just came together. He would come when he had an opportunity when he was at home.

Prior to our marriage, he had been in Johnson City, and we went then to Waynesville where he took training in agriculture. It must have been in the Fall of 1922, when he went to Athens. He took agriculture at Athens. He did not go to school every day. His training ended in the Spring of 1924, but he was in the hospital part of the time. Our first child was born February 3, 1922, at which time I was at my mother's at Due West. The next was born May 21, 1925, and the next two (twins) were born on February 18, 1927.

Mr. Halliday kept up a $3,000 portion of his insurance by the payment of premiums, and premiums are still being paid on that portion. I think it was in 1927 that he converted the $3,000 war risk contract into a policy of ordinary life insurance. I believe that in 1925 he applied for insur- [fol. 11] ance with the Pacific Mutual, but he did not get it. I don't know why.

In 1924, we rented a farm of 50 acres, known as the Long Place, from Dr. Burriss, Mrs. Pearl Long's brother-in-law, and my husband tried to farm. He had hands and tried to see what they did. We rented it for the years 1924 and 1925, and then went to where we are now, near Townville. We bought this place but have never paid for it. It has 73 acres. We haven't done any farming much, we have just had little patches. We raise a little bit of cotton each year, which is ginned at the neighborhood gin at Mr. Richardson's, and at Mr. McLees', and sometimes at Mr. Sullivan's, which is the nearest. I have tried to tend to that business, and we have had hands. The hands take the cotton to the gin. I pay the hired hands, and when Mr. Halliday was in the hospital I settled up for the ginning of the cotton. Since 1925 he has been in the hospital a good bit, and not always just for examinations. He spent three months one time and a month several times, but usually only for regular periodic examinations, usually at the hospital at Columbia. Yes, he has been sent to a mental hospital, in 1936, and stayed there about 30 days. That was the only time, and [fol. 12] he was discharged from the hospital. I have never requested that he be sent to any mental hospital because he did not want to be, although I thought it would be a good thing to put him away in a mental hospital, and his own physician has considered it necessary. I don't now insist that he be sent to the State Hospital in Columbia, but I think he should. I have suggested that he go to the hospital for mental diseases in Augusta, but he resents it so when I suggest it.

Five bales of cotton were produced on our place this year. We do not have any tenants, but Mr. Halliday did not raise the cotton. The boys and I have done that.

The Court: When was that?

Mr. Doyle: This year.

The Court: When was this adjudication and the appointment of a committee?

Mr. Doyle: I don't remember.

By Mr. Wise:

Q. When were you appointed his committee?

A. December 9th, 1935.

The Court: Well, I have been giving a good deal of thought to these situations, Mr. District Attorney. You

may have some authorities on it, but in these cases where a committee has been appointed and there is a solemn adjudication of the Probate Court, I don't think we ought to [fol. 13] inquire into any acts and doings of any kind subsequent to the date of that appointment, otherwise we would be collaterally attacking the adjudication of the court of exclusive jurisdiction as to the mental capacity of this boy.

Mr. Doyle: Except this. The judgment of this Court, if one is awarded, would be based upon the theory that the plaintiff, that is, the insured, will always be disabled or that it will continue throughout his lifetime. Such testimony might bear on the fact that there is an improvement or that there is no likelihood that the disability, if any, would continue throughout his lifetime. I don't think there is any presumption of law that one adjudged incompetent would continue to be throughout his lifetime.

The Court: There is only one way to do that; by a proceeding in that court or by the State Hospital at Columbia.

Mr. Doyle: The only way to upset that adjudication is on the question whether he is now competent. The question now is, if he is incompetent, will he always remain so.

The Court: Any judgment obtained at this time on this contract of insurance would be payable up to the date of the judgment and no more. This Court cannot bind you [fol. 14] or by its edict or order require you to continue paying it. Why take testimony on it if the Probate Court of this County has declared this man to be of unsound mind. I would charge the jury that he was totally and permanently disabled absolutely.

Mr. Doyle: As of that time.

The Court: On up from that time.

Mr. Doyle: But, your Honor, you cannot tell the jury that he will be of unsound mind all the time.

The Court: No, sir, but any testimony that you bring in now from December, 1935 up to date, as to any acts and doings or anything else, would be an attempt, it seems to me, to set aside the solemn adjudication of the Probate Court. I believe that whatever testimony the Government produces as to any acts and doings of this man, factual matters that might aid the Court and jury in arriving at a conclusion, would have to be limited up to December, 1935. From then on, I will have to charge the jury that up to this present time he is absolutely and totally disabled.

Mr. Doyle: Your Honor would also have to charge the jury that not only is that true, what you have just stated, but that before they can find a verdict, they must find that [fol. 15] it is reasonably certain that this condition will last throughout his lifetime, because that is the definition given under the statute.

The Court: I will be glad to charge that, because it is reasonably certain that he will remain in that condition.

Mr. Doyle: I will have to except to that, your Honor.

The Court: I think the cases are against you on that, because I have looked them up. The only way to attack that is by a direct attack in the Probate Court. I don't think we ought to take up the time of the Court or the jury in inquiring into matters from December, 1935 up to now. Now, prior to that time, you would have every right in the world, because he was then, so far as the world looks upon it, a man going about every day. You present your testimony, the plaintiff presents hers, and it is a question for the jury, but I just feel so satisfied in my own mind that I would be derelict in my duty if I did not put a stop-sign right at the date of the adjudication of insanity.

[fol. 16] Mr. Doyle: Your Honor, I don't know whether I made my position entirely clear. From that date that is a judgment of the court and I cannot attack it collaterally. I would have to go into the Probate Court to do that.

The Court: That is right.

Mr. Doyle: If I go into the Probate Court, I might not successfully do it, but the question here goes one step further. It is not a collateral attack on that judgment, but it is testimony on which this jury will want to answer the question, is it reasonably certain that he will always remain so.

The Court: As to that, I will charge the jury that so long as by the order of the Probate Court he is solemnly adjudicated a lunatic under the laws of this State, it is presumed that he will remain so. Of course, I will allow you an exception. I don't think we could trifle—I don't, of course, mean any reflection on counsel, but I don't think that you or I either one could trifle with the adjudication of the Probate Court, and I think we should respect it right from the moment that it should be respected. Your testimony, as I see it, ought to be limited up to December, if that is the correct date, December, 1935.

[fol. 17] Mr. Doyle: If your Honor rules now that my testimony is stopped as of that date, then I just won't attempt to go into the future.

The Court: I don't think I would inquire into that, because you will be allowed an exception.

Mr. Doyle: I will just stop at that point and take an exception. That will shorten it.

The Court: That will shorten it. I think the main issue is to go back to the discharge. Is this suit based on the insurance still in force?

Mr. Doyle: No, sir. I think I ought to state now, Mr. Wise is suing back to the date of discharge, but this insurance remained in force through September, 1920.

Mr. Wise: That is fine. I didn't know that.

Mr. Doyle: There are certain lapses and renewals, but I will show you the record on it.

The Court: It would be agreeable to stipulate it.

Mr. Doyle: I can give the dates on which it was lapsed and renewed.

The Court: If the final date of lapse is agreed upon, we can take that date and work forward.

Mr. Doyle: Well, let us just state the fact that the record shows. The original insurance was paid through April, 1919.

[fol. 18] The Court: What was the date, the exact date?

Mr. Doyle: Well, it was through April. Then it lapsed and was reinstated effective August 1st, 1920, and premiums were then paid through September, 1920, which would make it finally lapse, including the days of grace, on October 30th, 1920.

The Court: All right, sir. Thank you very much, Mr. Doyle.

Mr. Wise: If your Honor please, counsel for the plaintiff has no objection to his asking any questions as to the record of his activities since the appointment of the Probate Court was made. It is true that we have no proof, as Mr. Doyle stated, that it is reasonably certain that this condition will continue throughout his lifetime. I don't know that that question has ever come up. Of course, in our medical testimony we will have proof as to that. I think that the Government records in court will show that the man evidently was insane, according to their own records. So far as we are concerned, we have no objection to any-

thing he wants to ask since 1935. That is our position on that.

The Court: Well, sir, my own judgment is that there is no need, reason, or legal right to go into the facts from December, 1935 on, but if you have no objection, go right ahead and cross-examine the witness on matters up to date. [fol. 19] Mr. Doyle: I don't want any halfway measures about it. If I am permitted to attack it, I want to attack it all the way through, medical records and otherwise.

The Court: I would not let you go into the medical side, because three doctors have declared him to be of unsound mind and he has been declared by the State of South Carolina to be of a fixed mental status. We might as well rely on my former ruling. I will allow an exception and we will not go beyond 1935.

[fol. 20] J. M. Broyles, a witness for the plaintiff, testified:

I live on a farm near Townville, in Anderson County. Mr. Halliday moved to that community some time near the Spring of 1925—I don't remember the exact date. They live about 3½ or 4 miles from me. They came to our church regularly and moved their letters there. Mr. Halliday's farm is all river and hillsides, rock and gully, and the bottoms are swampy. I went there once to collect church dues and he was trying to cultivate and was dirty all over. He told me that the cultivator had turned over with him. That was the kind of land it was.

I have observed Mr. Halliday's mental and physical condition but it is hard to explain it. From the time he moved there through December 1935, what time I was with him and had occasion to see him he seemed to be all unbalanced, both mentally and physically and I told a Government man this several years ago. I didn't see how a man could work and get along in the physical condition he was in. He was always complaining and "jowering." I reckon he has been mad at me, he stopped speaking to me, or coming around me. I reckon he is mad at me. He wanted me to do something for him and I wouldn't do it, and he hasn't spoken [fol. 21] since. He is sort of crossways with most of the neighbors up there. He doesn't like my son-in-law; he doesn't seem to like anyone from the way he acts. I can't tell his own feelings, but from the way he acts is all I have

to go by. I would not have hired him as a farm hand at any time since 1925. I wouldn't want such labor as he would give me. I would not be sure whether I have seen his wife work on the farm. I have seen her picking cotton. I have not been about her home. They are four miles off the road where I would go anywhere, and it was very seldom I was down in that section.

Cross-examination of Mr. Broyles:

Q. Now, what year was it, Mr. Broyles, when he moved close to you?

A. I wouldn't say positively. It was some twelve or fourteen years ago. I have no recollection of the date.

Q. Do you know where he moved from?

A. I don't know that either. I don't know where he moved from. The first I knew, he moved on this place and came to Church.

Q. I was about 1925 or 1926, wasn't it?

A. Somewhere along there, I imagine.

Q. I believe Mrs. Holliday said they lived on the Long place in 1925.

Mr. Wise: 1924.

By Mr. Doyle:

Q. 1924, so it must have been either 1925 or 1926 when they moved up near you. You say that is pretty rough land on [fol. 21a] his farm?

A. Yes, sir.

Q. Did you see him prior to 1935 working on that land?

A. Along in that time. I haven't been about his place there for some four or five years, since he got so he wasn't friendly with me. He stayed at home and I stayed at home.

Q. I am talking about before 1935. Did you see him often before that?

A. Not often. Not after he quit coming to Sunday School.

Q. He came pretty regular in those days?

A. He came every Sunday until he quit and moved to another Church.

Q. In 1925, 1926 and 1927 and those years, he was going to Church rather regularly, wasn't he?

A. Yes, sir.

Q. And at that time he was getting along with his neighbors, and it was after that time that he commenced showing

signs of not being able to get along with his neighbors, and it was after that time that he withdrew from the Church, wasn't it?

A. Yes, sir.

Q. And joined somewhere else. So during those years, he was so far as you could tell, doing very well?

A. No, he never was normal from the first time I knew him; not what I would call a normal man or what I would [fol. 21b] myself want to do.

Q. Do you remember a gentlemen, Mr. Wright, who came to see you in March, 1938?

A. Some man, yes, sir.

Q. And you told him what you remembered?

A. Yes, sir.

Q. And gave him this signed statement? (Handing paper to witness). That is the statement you gave him and your signature?

A. That is it.

Q. And that is a true statement, isn't it?

A. Practically straight, yes, sir.

Mr. Doyle: Mark that for identification.

Statement of J. M. Broyles, dated May 23, 1938, hereinabove referred to, is marked for identification and initialed, "W. M. W."

Q. So you fell out in 1935; I mean he fell out with you? I know you well enough to know that you are not going to fall out with anybody. That would be about 1935?

A. That would be about right, I reckon.

Mr. Doyle: That is all.

The statement of J. M. Broyles, dated May 23, 1938, above referred to and subsequently introduced in evidence as Government's Exhibit #4, is as follows, except for the omission of the part relative to Mr. Halliday's condition subsequent to December 1935:

I am acquainted with James Haskell Halliday and remember that he came to this section a few years after the [fol. 22] World War. He has a one horse farm and farmed it regularly up to four or five years ago. I don't know exactly how much cotton he made but it couldn't have been over six or eight bales. When he first came here he seemed

a little peculiar in his mind but we didn't notice anything wrong with him physically and his mind seemed to gradually get worse. I would not consider him to be permanently and totally disabled at the time he came here, as he did a lot of work then, but * * *.

Redirect examination of Mr. Broyles:

Q. Did you write this statement up?

A. No, the gentleman who came to see me.

Q. Do you know whether he put down everything you told him?

A. No, he didn't. He put down sort of a synopsis.

Q. Did you tell him all you have told the Court?

A. No, not all I guess.

Q. Is there anything else you want to tell about this boy's condition?

A. No, I think I have about covered the ground.

Q. Did he ever come to your place to visit you?

A. Yes, sir.

Q. Did he talk much?

A. He talked all the time nearly and I wouldn't get in a word or two.

Q. Did you ever talk to him at a time in your life that he wasn't complaining?

A. I don't think so.

Mr. Wise: All right.

[fol. 23] Mr. Doyle: That is all.

Witness leaves stand.

Henry Jackson, a witness for the plaintiff, testified:

I am a cotton buyer in Anderson, South Carolina. I have known James H. Halliday practically all of his life. We were raised in the same neighborhood. Prior to the World War he was a good normal country boy. He was in good shape and did good work. I have seen him pretty often since his return from the Army.

Q. What have you observed about his condition now compared to his condition before he went to the army?

Mr. Riley: Your Honor, we would like for him to put the date prior to 1935.

By Mr. Wise:

Q. Well, from the time he got out of the army—of course, they insist that we limit that.

The Court: I think it is right. The Court will tell the jury and will tell the witness that from 1935 on, he has been judicially declared to be of unsound mind. Now, there is no use, I think, to take up the time by going on. You can state that he was declared of unsound mind in 1935, and [fol. 24] from then go back to his entrance into the army.

By Mr. Wise:

Q. Up to 1935, from the time he got out of the army, he was in the hospital some of the time sick and taking vocational training. Up to 1935, how did his condition compare, physically and mentally?

A. Well, for the last several years, it seems that he has been in a highly nervous state and he talks quite a bit about himself, about his general condition. He seems to dwell on that pretty considerably; and from his appearance, he looks like he was in pretty bad shape, from a nervous standpoint.

I cannot say that I know exactly what is wrong, but he was in good shape before he went in the Army. He was strong before that. As to whether or not, since the War, he thinks people in the community are against him, and as to whether he has ever been made at me, well, he dwells on that.

Cross-examination of Mr. Jackson:

I would say that for the last 10 or 12 years he has seemed to be very nervous. I have not visited at his place. I have just seen him here in town. I have had no opportunity to see him at his farm, nor to know whether he did any work. [fol. 25] I don't know anything about whether he transacted any business at his farm.

B. M. Stevenson, a witness for the plaintiff, testified:

I operate a drugstore in Anderson, South Carolina, and have known James H. Halliday about 25 years. I knew him before the World War. I was 19 when the War ended. I knew him very well before the War. He worked in the fall

for B. T. Anderson Clothing Company, and I worked at a drugstore across the corner. He worked there during the fall and market season.

After he returned, he seemed to be a changed man in respect to his different friends he had before he left. He didn't seem to keep in touch with them. He seemed to find fault with them or something was wrong with him. He didn't seem to be the same man. Yes, he has been mad at me a lot of times. Before he went into the Army he had quite a number of friends and used to sit around the drug store where I worked, but since he came back he argues with everybody he sees nearly about his condition, and he is in bad shape and has been in bad shape. He is always wanting some new remedy to help him; some new medicine. He complains about his physical condition.

[fol. 26] Cross-examination of Mr. Stevenson:

Mr. Halliday was not always by himself when I saw him in town prior to 1935. He was sometimes with his wife, and sometimes by himself. He came in my store and would talk to all of us. He was an old friend before he went to the Army, but since, well sometimes he gets mad.

S. E. Leverett, a witness for the plaintiff, testified:

I am the postmaster at Iva. Prior to the World War, James H. Halliday had a farm about 2 or 2½ miles from Iva, and I think that was his occupation, farming. There was nothing unusual about him at the time. I was discharged from the Army in March 1919 and came home a little before he did. Since then I have seen him occasionally once or twice a year, but for the past 2 or 3 years I can't say that I have seen him. I heard that he had taken vocational training. I keep pretty well posted on the boys around home.

I saw him fairly regularly for several years after his return, but since they left that country I have just seen him intermittently since that time. When he returned he seemed to be a man that didn't have a grip on himself. It was nervousness of some kind. I don't know what the medical term would be. It seemed that he didn't have the best con-
[fol. 27] trol of himself. He was nervous and in that con-

dition. It seemed to me that he complained about his condition. I couldn't say whether he was or was not more talkative after the War than he was before. I don't recall that very clearly.

Cross-examination of Mr. Leverett:

I could not be sure as to when he took vocational training, or when he was in Waynesville and Athens. I just met him and his brothers as they passed through Iva there and stopped. I couldn't have seen him in Waynesville.

E. H. Halliday, a witness for the plaintiff, testified:

I am the eldest brother of James H. Halliday and live near Anderson, South Carolina. I have a small grading and hauling business known as E. H. Halliday & Son, operating about twenty trucks. My brothers, James H. and Crimes W. Halliday both served in the World War.

I was on the farm with my mother when my brothers returned from the Army, having moved back there to help her when they went away. I remained at the farm for two years after their return, until a younger brother was old enough to take charge of it. I wired my brother, James H. Halliday, money to come home from New York after his [fol. 28] discharge, and when I saw him I observed that he was a physical wreck. I detected in five minutes the expression he had was not right, he was nervous and his complexion was bad. He had lost a lot of weight and was altogether a different man. He tried occasionally to work on the farm. He came down and tried to help one day, but he was never able to make a full week since he came out. As to what would happen when he tried to work, it was just like you or I if we had no strength we would have to sit down. He complained the first day with his stomach. He had some medicine, milk of magnesia, in his suitcase and was taking it the first day he came home. He wanted to dwell on the War continually and talked freely about it.

He and I could always agree up until the War, but after he came back we couldn't agree and cannot yet. He doesn't like me. As to whether he has kind of got it in for me, I don't know. I haven't spoken to him for 2 or 3 years. He never comes around my place of business.

Cross-examination of E. H. Halliday:

When my brother first went to Waynesville I saw him possibly once every 2 or 3 months. After he left Waynesville I possibly saw him every week-end or every other week-end. He and his wife didn't come home often from Waynesville. I only saw him when he visited the family. [fol. 29] The visits were not what I would call regular visits. He and his wife would come from Athens maybe a week-end or every other week-end. Sometimes they would stay at my mother's and sometimes they would come to see me. Just the ordinary week-end visits a person would make. Just like you and me coming to see our folks when we took a notion to come. I don't think he is on friendly terms with anybody. This has been going on through the years.

PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit #1, consisting of reports of examinations of the plaintiff by Government medical examiners and of Government hospital records relating to the plaintiff, contained the following:

April 12, 1920. Diagnosis: Chronic Pulmonary Tuberculosis moderately advanced, arrested.

May 13, 1920. Diagnosis: Tuberculosis, chronic pulmonary, moderately advanced Arrested.

February 14, 1921. Diagnosis: Amygdalitis, chronic, Talipes valgus, Tuberculosis, chronic pulmonary, arrested, Hypochondriasis.

[fol. 30] February 16, 1921. Diagnosis: Tuberculosis, chronic pulmonary, arrested.

July 30, 1921. Diagnosis: Pulmonary Tuberculosis, chronic, apparently arrested.

May 9, 1922. Diagnosis: Tuberculosis, Pulmonary, Chronic, Inactive.

June 7, 1922. Diagnosis: Tonsil-itis chronic; Tuberculosis, pulmonary chronic, arrested. Pes planus, second degree.

May 11, 1922. Diagnosis: Questionable chronic pulmonary tuberculosis, arrested. Chronic tonsillitis. Patient should have tonsils removed, which probably would remove the pain and aches in muscles and limbs.

August 25, 1922. Diagnosis: Tuberculosis, pulmonary, chronic, Inactive, apparently arrested.

September 30, 1924. Diagnosis: Tuberculosis Chronic Pulmonary.

December 17, 1924. Mental examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis.

Pulmonary diagnosis Positive; apparently arrested; minimal (incipient).

Findings of Board: It is our opinion that claimant has an industrial disability of fifteen (15) per cent from Tuberculosis, chronic pulmonary, minimal involvement, apparently arrested. There is no N. P. Disability.

November 24, 1925. Diagnosis: Dental caries of teeth. Tuberculosis, Chronic, Pulmonary. Psychoneurosis, Neurasthenic Type.

[fol. 31] November 24, 1925. Neuropsychiatric examination:

Claimant says that he is unable to work, has many fears, and at times feels that everything is going wrong; loses confidence in himself although he still has a great amount of ambition. Not able to work at manual labor, becomes depressed and blue, and worries a great deal. Rest is disturbed at night, has a feeling of impending danger, occasionally thinks that the government is not treating him right; rest at night is disturbed. Suffers with dizziness and bodily weakness, occasionally gives and has to stop what he is doing. Claimant appeared very nervous during examination and was difficult for him to keep still. He has numerous somatic complaints, and complains of a great many things which physical examination fails to reveal. Orientation and memory good. Apparently no insight into his condition. No evidence of auditory or visual delusions or hallucinations. Shows no apparent deterioration.

Diagnosis: Psychoneurosis, Neurasthenic Type.

March 16, 1927. Diagnosis: Bronchitis, Chronic, Moderate Severity.

Neuropsychiatric examination:

The following is a sample of stream of conversation: "I just ain't stout—there are so many things wrong with me, I think I've got everything—maybe I think I have a whole lot wrong with me that I ain't got. It shoots me worse to come down here on the train, than anything else—feel like

I got grippe now. Sometimes I feel fairly well. I ain't got [fol. 32] no physical strength—I just naturally ain't strong." Claimant says that he has mental fatigueability, feels tired mentally, as well as, physically; suffers with headache and indigestion. States that he has been taking medicine—milk of magnesia and syrup of figs, and soda every night for the past seven years—has got to where he can't even retain that, and he "vomicks at night." States that he stays constipated a good deal of his time, and that his medicine has got to where it does not do him any good. Everything he eats, even to milk he drinks, sours on his stomach. States that he believes he has Tuberculosis, or Ulcer of the stomach. States that while in the service unloading meat, a heavy box fell on him, and injured his back, and that he was in plaster of paris cast for about three months, and that his stomach trouble and indigestion date from that time.

Claimant is listless and ap*pe*thetic—shows a great deal of hebetude; is introspective—anxious attitude. No evidence, however, of any Psychosis.

Diagnosis: Psychoneurosis, Neurasthenic Type, Moderate Degree.

December 15, 1929. Diagnosis: Psychosis, neurasthenia type.

January 15, 1930. Diagnosis: Psychosis, neurasthenic type, moderate.

December 21, 1932. Mental Examination: Patient has the same nervous complaints as on the last Bureau examination, March 16, 1927. States that he used to have all kinds of superstitions and fears and imaginations; that he might be in the field and would imagine that someone was in the woods with a gun fixing to shoot him. Is not as suspicious or imaginative but while that part is better, his stomach condition is worse and his nervousness is still just as bad. [fol. 33] Heart flutters a great deal and beats too fast. Feels tired mentally and physically all the time. Has no energy and no physical strength or resistance. Still vomits very frequently; suffers with indigestion; food and water sour; medicines nauseate him and make him vomit. Injured his back while in service and had to wear a plaster cast. Says the cast was too tight and irritated his stomach and he had to drink a lot of milk, and he dates his stomach trouble from that time on. Patient still presents an apathetic, listless attitude and manner. Anxiety, introspection

and hypochondriasis characterize his general attitude and manner.

Diagnosis: Psychoneurosis, Neurasthenic Type, Moderate Degree.

September 13, 1933 to November 24, 1933. Report of hospitalization at Columbia, South Carolina.

Mental Examination: This patient has been examined more than once in the past and has shown neurasthenic symptoms each time. His complaints today are nervousness, worse at times than at others. States that any excitement or sudden happenings seem to tear his nerves all to pieces; states he is weak all the time and has no energy, just simply feels tired all the time and not able to do anything. Stomach has been bad for fifteen years. States he is irritable over the least little thing. Gets over it quickly but feels weak after this. Bowels are kept regular all the time by taking active medicine but he has pains in his stomach. Patient, at one time, had a number of phobias and obsessions and peculiar imaginations but is not suffering from those symptoms lately. States that he cannot sleep at night, gets no rest. Patient shows lowering of his emotional tone, anxious facial expression, rather apathetic [fol. 34] and restless in his attitude and manner. Introspection, apathy and hypochondriasis characterize his general attitude and manner.

Diagnosis: Psychoneurosis, neurasthenic type, moderate degree.

April 11, 1935. Diagnosis: Bronchitis, chronic, mild.

Mental examination: Patient is not very high in the intelligence scale. He is unable to state his symptoms and his past history in a very intelligent manner. Seems hesitant about answering a number of questions, particularly those with reference to his industrial history. It seems that he has never been a very ardent worker. States that at the present time he has rented out his farm. Still keeps a mule, plants a garden and patches around the house; later contradicted this statement and stated he did do some work on the farm. His industrial history is unreliable. Shows a lowering of his emotional tone. Anxious facial expression. Has an apathetic, resigned and slumped attitude. He is suggestible, introspective, hypochondriacal. His complaints with reference to his nervous symptoms have not changed. He still complains of being easily excited by sudden noises or happenings, feels weak and tired

most of the time and states he is unable to hold out at work. Still has stomach trouble. Is irritable. Has no delusions, hallucinations or paranoid ideas. No evidence of a psychosis is elicited. No change is found in this patient's condition since his last examination.

Diagnosis: Neurasthenia, Moderate Degree.

[fol. 35] (Subsequent examination reports, dated December 18, 1935, and June 30, 1936, contained in Plaintiff's Exhibit #1, were offered in evidence by the plaintiff, but objected to by the defendant and excluded by the Court.)

Dr. J. N. Land, a witness for the plaintiff, testified:

I have practiced medicine in Anderson County, South Carolina, since 1903. I was the family physician of the Halliday family, and have known James H. Halliday since he was a little tot. He was a very bright boy before he went into the Army. I came in contact with him in 1919. As to what I know about the boy physically and mentally, from the time he was discharged from the Army up until December 1935, well I found that he had an arrested case of tuberculosis, he had some arthritis, and he had a mental condition which I thought at the time, and still think, was a psychoneurosis. In other words, he was rather much of a hypochondriac. Psychoneurosis, of course, is a mental condition which makes a man think he has everything the matter with him. He came in and complained of everything. He is complaining all the time. Psychoneurosis is a condition where a man imagines everything. In psychoneuorsis a man's mental condition is such, for instance, if I may put it in plain language, that you might suggest to the man that he has a new disease, and he proceeds upon that opportunity to tell you these things and it rolls up and becomes a big thing to him. He is the talking [fol. 36] type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about

his business. I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

The report of February 1921 shows hypochondriasis, that is a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with [fol. 37] this man he has dwelled on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike.

Q. Doctor, I will ask you this. Did you ever find anything actually wrong with his heart?

A. Signs of an arrested tuberculosis.

Q. Does that affect a man's heart sometimes?

A. Sometimes, yes, sir.

Cross-examination of Dr. Land:

As to whether I was ever really the plaintiff's family physician, yes, sir.

Q. When?

A. Since about six years ago.

I really don't know whether Dr. Webb at Townville was his physician prior to that time, or who was his physician. I have only been his physician since about six years ago, and from 1919 to that time was not really his physician, and for that period I really don't know anything professionally about him, except from observation. I did not examine him physically until about six years ago.

[fol. 38] Q. And you did not make any examination of him mentally?

A. Mr. Doyle, you know a mental examination consists largely of an examination of the patient.

Q. He was not your patient at all?

A. No. The mental condition is largely judged by conversation.

Q. You are not a mental expert are you?

A. No, sir, I am in the general practice.

Q. A general practitioner. Now, during the first four years after his discharge from the army, when he was taking vocational training most of the time, would you say you had seen him at all during that period?

A. During what period?

Q. The period he was taking vocational training. He was at Waynesville during that time and at Athens, Georgia, and you were here in Anderson practicing medicine?

A. I couldn't say that I had seen him at any stated time. I would see him occasionally on the streets or in a drug store, and every time I would see him he would insist on having a conversation and telling all his ailments. Talking about a mental expert, we all have to be enough of a mental expert to pass on insanity to commit people to hospitals. I don't profess to be a mental expert.

[fol. 39] Prior to the adjudication in 1935, I did insist as a doctor that he be sent to an institution. I sent him to one of the Government institutions for an examination. He stayed, I imagine, about thirty days.

Q. Now, when you testified in the Probate Court that he should have a guardian appointed for him, right then and prior to that time you didn't think he ought to be committed to the State Hospital for the Insane?

A. He was not at all violent and I considered that if he could have somebody transact his little business for him, that since he was not violent it would not be necessary to commit him to an insane asylum.

Q. You didn't think so then?

A. I did not.

Q. Nor at any time prior to that time?

A. I did not.

Q. You say, in other words, that he was not crazy then. He had psychoneurosis. That is nervousness?

A. Neurosis is nervousness and psychoneurosis is a disease in which the brain is unbalanced to the point that they imagine almost anything.

Q. Imagines he was sick?

A. Imagines he was sick.

[fol. 40] I wasn't able to find anything else except arrested tuberculosis, some arthritis, and a few other little things. The tuberculosis was arrested, but was not cured. It was not active. The arthritis was a minor condition. As to whether it was serious at all, that is where his mental attitude comes in. He imagined it as well as he imagined that everybody was against him. That is where he showed his mental unbalance. Psychoneurosis and hypochondriasis are practically the same thing.

I have no record of any visits to him in 1920 and 1921, and made none until 1932 or 1933. I would say I saw the man at least two or three times a year, possibly more. Probably more all the way from 1919.

Q. But he was not talking to you professionally at all?

A. He would talk to me professionally in this way. He always wanted me to do something for him; could I give him something for his stomach; could I do this and that and the other. He could not get anybody to do anything for him; the Government wouldn't do anything; this man and that man were doublecrossing him, and he would then gradually get on to his neighbors, and they were doublecrossing him.

Q. You knew that he had other doctors who were waiting on him?

A. I never paid any attention to him. Prior to 1932, I never prescribed. I just told him to try so and so.

Q. You didn't think anything was the matter with him?

A. I thought he was a crazy man. You have just got [fol. 41] to handle those people the best you can. He was not my patient. I simply shunted him off and got away from him as best I could.

The first time I examined him was about six years ago. I think I gave him something then. He seemed to have hyperacidity, and I gave him something for that. That is a condition of the stomach. I knew he had been under the care of the Government physicians for years, and I always thought that any ex-soldier is due to be treated without cost. As to whether hospitals are available and have been, not always. Not always since 1925. There is not always one available in Columbia. It was not in 1937. As to whether or not he could have gone to any of the Government hospitals in Columbia, Oteen, Johnson City, and Augusta, I don't know. I don't know whether he has ever stayed in one more than three months. The record will

show. I don't know whether he went there largely for routine examinations. I know just what I came in contact with personally. I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia, and they discharged him from the hospital in Roanoke as mentally competent, yet they [fol. 42] wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was mentally competent when he was discharged from Roanoke, they wouldn't take him in Columbia for intestinal trouble and wanted to send him to Augusta. I asked that question and they never answered it.

Redirect examination of Dr. Land:

My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would recover. Has that been verified by the fact he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir.

Mr. Wise: If your Honor please, I have never done this before and don't know whether it is correct or proper or or not. I have the plaintiff in Court. I feel that he is not able to take the stand, still I would like to put him in as Exhibit A, B or C somewhere in the trial of this case.

[fol. 43] The Court: You would not, under the conditions, be required to put him on the stand.

Mr. Doyle: I won't object to his putting him on the stand. I won't cross-examine him unless he asks him some questions.

Mr. Wise: I just wanted the jury to see him.

Crymes W. Halliday, a witness for the plaintiff, testified:

I am a brother of the plaintiff. Prior to our entry into the Army we both worked at the Anderson Brothers Dry Goods Store and were paid $100.00 a month or $25.00 a week. When they moved the firm to Greenwood from An-

derson, my brother got $150.00 a month. When I first saw my brother after his return from the Army, his condition physically and mentally was practically the same as it is today. I would say he was a complete physical and mental wreck, very badly torn up physically and mentally. We both stayed on the farm with our mother. My brother went to hospitals and he took vocational training. I have not seen him do any successful work since he was discharged. As to whether my brother is mad at me, well sometimes he is mad and sometimes in good humor. I am always in good humor with him, trying to appease him and keep him in [fol. 44] good humor. He always wants to talk about the World War continually. After my return from the Army, I was not much inclined that way, but my brother was very much inclined to talk about his experiences in France.

PLAINTIFF'S EXHIBIT 2

Plaintiff's Exhibit #2, consisting of the records of the Adjutant General's Office relative to the plaintiff's service history, contained the following:

December 17, 1918. Admitted to U. S. Army General Hospital #19, by transfer from Debarkation Hospital #1, Ellis Island, New York. Clinical record (history): Inducted June 24, 1918. Sent to Camp Jackson, South Carolina. Sailed for France August 22, 1918. On September 22, 1918, while unloading vessel in Quartermaster's Department he hurt his back. Was sent to Camp Hospital #33, where they put on a plaster-paris jacket. About this same time he had irregular vomiting spells. Was then transferred to Base Hospital #65 a few weeks later. From there sailed to the States. At Ellis Island, not knowing how to dispose of him, he was sent to General Hospital #19, with a doubtful diagnosis of tuberculosis.

[fol. 45] Note.—Taken from Disability board, Camp Hosp. #[illegible]. G. S. #5, S. O. S. A. E. F. History—Entered hosp. Sept. 7th, 1918. Diagnosed influenza. Was working on dock for 2 days prior to entrance and had a chill and sprained back. Has always had lung trouble and is unable to do any walking. Any moving causes pain. Physical Examination: Negative, except he is very nervous. Lumbar spine very tender and processes of 2nd vertebrae seem to be out of line. Erector spinae very tense.

X-ray Examination: Shows no displacement of vertebrae, but some apparent decalcification of 1st and 2nd lumbar. Condition on admission: Feels weak. Slight cough and expectoration. Is nervous, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times. Hyperacidity in stomach. Looks nervous, but not particularly sick. Present weight, 132½ lbs. Maximum, 158 lbs.; minimum, 130 lbs. Height, 5 feet, 8 inches. General condition: Fairly well nourished, but somewhat anaemic. Special senses: Conjunctivae, reddened. Glandular system: Apparently normal. Vascular system: Pulse regular, good tension, apparently normal in rate. Blood pressure: Systolic, 134. Diastolic, 94 P. 40. Heart: Apparently normal in size, position and rhythm. Genito-urinary system: No evidence of disturbance. Abdomen: Slightly distended. Liver: Apparently normal in size [fol. 46] and position. Spleen: Not palpable. Tenderness: None determined. Masses: None palpable. Nervous system: Reflexes apparently normal. Patient gives impressions of neurasthenia. Osseous system: Tenderness elicited over 1 to 4 lumbar vertebrae. Slight kyphosis present. Muscles and joints: Apparently normal. Diagnosis on transfer card: Tuberculosis pulmonary chronic inactive, right upper. In line of duty. Diagnosis of ward surgeon: Under observation for tuberculosis of spine. Line of duty.

December 20, 1918. X-ray findings: TB pos. TB chronic, fibroid. Recently active. Oldest lesion not determined. Definite lesions in both apices, 2nd int sp upper left, 2nd int sp upper right. Heart is small, pear-shaped, almost in midline. These abnormal densities have been diagnosed TB but may be result of a heart lesion. (Mitral Stenosis) If they are the result of TB they may be healed and have no clinical significance. No evidence of spinal trouble can be made out on these plates. Plates poor. No sputum obtainable.

December 20, 1918. Clinical History reviewed and patient examined. Symptoms largely subjective. Slight limitation of motion equal in all directions of lower back. Opinion [fol. 47] muscular strain—sacro iliac synchondrosis—probably recovering—without positive X-ray findings—with only tenderness over spine and area about, with definite history of trauma 3 mos. ago ("sudden sharp pain a giving way of something in the back on heavy lifting—immediate disability") can make diagnosis only of sacro-iliac strain.

December 21, 1918. Chest. Tuberculosis, pulmonary, chronic, inactive, bilateral, right upper lobe and left apex. Fibrinous adhesions left lower lobe.

January 1, 1919. Returned from furlough. Venereal examination negative. Patient seems in good condition, says he has some pain in back and in the right lower quadrant of the abdomen.

January 11, 1919. Does not retain any food. Has been placed on special diet.

January 16, 1919. Condition unchanged from previous week. Surgeons have been called in consultation. X-ray has been taken of the spine. Lungs negative. Venereal inspection negative.

February 10, 1919. Complains of stiff back, has bad cold, ordered culture of throat. Soreness in back of head and extending down the spine.

[fol. 48] February 8, 1919. Eats fairly well. No cough or expectoration.

February 15, 1919. Has recovered from stiffness in neck, also from cold. Eats and sleeps fairly well.

February 22, 1919. Conjunctiva show mild infection. Has mild laryngitis.

February 28, 1919. Progress satisfactory.

March 14, 1919. Progress satisfactory.

Declaration of soldier on report of physical examination of enlisted man prior to separation from service in the United States Army, dated March 27, 1919:

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability, or impairment of health, whether or not incurred in the military service? Answer—no—(No signature.)

Certificate of examining surgeon:

I Certify That:

The soldier named above has this date been given a careful physical examination, and it is found that

He is physically and mentally sound with the following exceptions:

Tuberculosis pulmonary 3rd rib and 3rd dorsal spine up left side, chronic. In line of duty. Pes planus (2nd degree). Not in line of duty.

[fol. 49] The wound, injury, or disease is likely to result in death or disability. In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States. In view of occupation he is 20 per cent disabled.

Evidence For Defendant

Dr. C. H. Young, a witness for the defendant, testified:

I have been practicing medicine in Anderson, South Carolina, since 1913. I am a medical examiner for the Pacific Mutual Life Insurance Company, and was in 1925. That is my signature on an examination report of James Haskell Halliday, dated July 15, 1925, and it indicates that I made the examination in my office here in Anderson. He came to my office. I have no independent recollection of the man. The report indicates that I asked the questions there set out, and I obtained the answers from the plaintiff, as indicated, and wrote them down myself. The physical findings are those which I reported as a result of my examination. As to whether the examination was as thorough as those questions would indicate, the answer is just that and nothing more.

[fol. 50] I actually examined him to find out whether or not those answers were correct and I put the answers down in my own handwriting. The statement at the bottom of the report is in my handwriting, as follows: "Applicant has lost no time from work past 5 yrs. I find nothing abnormal in back or elsewhere. C. H. Young." I recommended him for the life insurance and recommended the risk.

The form does not indicate anything at all in the nature of a mental examination. If there had been anything noticeable in his conduct from a mental or nervous standpoint, if there had been anything manifested, I would have noted it, yes, sir. It was the usual life insurance examination and I thought he was a good risk for life insurance, and that is all I recommended. The form indicates that Halliday himself signed his own statements in my presence. That is customary. It indicates that he signed it before me and after answering these questions.

Defendant's Exhibits 1 & 2

Defendant's Exhibits #1 and #2, consisting of the plaintiff's application for life insurance with the Pacific Mutual Life Insurance Company and attached Medical Examiner's Report, showed the following:

[fol. 51] The plaintiff stated in his application that he was 32 years old; that he was a farmer and land owner and had been so for life; that he had no other occupation; that he was applying for a $3,000 ordinary life policy with the provision for permanent total disability benefits of $45.00; that he had no other life insurance then in force.

A portion entitled "For Home Office Endorsements Only" contained a statement in long hand that the number 5½, referring to the permanent total disability benefit appearing above, is as follows: "Amount of Permanent Total Disability Benefits—None."

A part entitled "Questions To Be Asked By The Medical Examiner" contained answers over the plaintiff's signature to the effect that the applicant had never changed, or been advised to change, his occupation or residence to benefit his health; that he did not use alcoholic beverages or drugs and had been a total abstainer all his life; that no one in his family had committed suicide or suffered from cancer, epilepsy or insanity; that no one in his family or immediate household had ever died of consumption or any other contagious disease; that no insurance company has ever refused, limited, or postponed his application; that he had [fol. 52] never applied for insurance without getting the policy; that he had no other application then pending; that he was receiving pension or Government compensation in the amount of $40.00 per month and had been for the past two years, and had received $145.00 a month for three years; that he had never been treated for, among other things, mental derangement, shortness of breath, chronic cough, spitting of blood, influenza, pneumonia, pleurisy, bronchitis, tuberculosis, or nervous prostration; that he had given full information about each of the foregoing questions; that he had consulted physicians or practitioners during the preceding seven years for tonsillitis, injury to back while in the Army, stating that he had been in a plaster cast for two months; that the X-ray had been negative and the injury had been considered sacro-iliac strain; that his weight had

neither increased or diminished during the preceding year; and that he was at the time of the signing of the application in good health.

The "Medical Examiner's Report" reveals that the applicant was a stranger to the examiner; that he was 5 feet, 7 inches tall, weighed 132 lbs., his chest measured 32 inches [fol. 53] on expiration and 36 inches on inspiration; that his general appearance indicated perfect health; that he was not deformed or lame; that there was no impairment of sight or hearing; that the respiratory murmur and percussion note was normal over all parts of both lungs; that there was no indication of disease of the heart or blood vessels, systolic blood pressure, 116, diastolic, 70; pulse rate while seated, 70; pulse did not intermit or become irregular or unequal; there was no evidence of arteriosclerosis or other degenerative changes; his temperature was 98; that the examiner did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system"; that there was no undue hazard to life or health from the applicant's occupation, residence, or pastime which might affect the risk as to life, accident, or health insurance; that the examiner knew nothing in connection with the moral character, physical condition, or past health record not already detailed which would affect the applicant's insurability; that the examiner had reviewed all answers and initialed all changes on both sides of the blank; and that he recommended the risk. At the bottom of the page appeared the following:

[fol. 54] "Notice to Medical Examiner.—If you know of any facts affecting the risk not covered by your report, please state them below, or send a confidential letter direct to the Medical Department of The Pacific Mutual Life Insurance Company, Los Angeles, California. Applicant has lost no time from work past 5 yrs. I find nothing abnormal in back or elsewhere. C. H. Young."

Cross-examination of Dr. Young:

If the applicant had told me that he had been in a Government hospital for pulmonary tuberculosis, and had remained there over a period of time from August 1919 to April 1920, for tuberculosis, I would have at least mentioned that in my remarks on the examination report and let the

insurance company decide the matter. I made no mental examination at all. I don't know whether or not the policy was finally issued to plaintiff. You cannot always determine from talking to a man on the first examination whether he is mentally all right. It requires more than that, yes, sir. I have no recollection of seeing the man before July 15, 1925. If I had been treating him from the time he was a boy and had been his family doctor and after his return from France had seen a change in him and talked with [fol. 55] him from time to time I would have been in a better position to make an examination as to his mental condition, yes, sir. It is not unusual to examine a man physically and to overlook the mental side, that is quite right. Very often, even over a long period of observation the patient can conceal the fact that there is abnormality so far as mental condition is concerned. They are susceptible to doing that in dementia praecox, and so on, yes, sir.

Q. In other words, they are the smartest people in the world?

A. Yes, sir, they are:

Mr. Doyle: We object to that as being a hypothetical question as to dementia praecox. Therefore, his answer to such question is incompetent.

The Court: I think your objection is correct. I think Mr. Wise could inquire of the witness whether or not certain symptoms testified to would lead a medical man to conclude that he might be suffering from dementia praecox.

Mr. Doyle: But since there is no evidence of dementia praecox, the question elicits an incompetent answer.

The Court: On that ground, I think the objection should be sustained.

A mental examination was not made at all, no, sir. I know nothing about this boy except from hearsay.

[fol. 56] Emphysema just means that a good many of the individual vesicles of the lung have formed one large vesicle, and the smaller vesicles are ruptured. It is in larger spaces. There is more air in the lung and it is harder to get rid of the air as well as normally. Not referring to this case, as to whether that affects a man doing physical work, it does to some extent, depending on the man. A patient would have to be under my observation for a period of time to determine it, yes, sir.

Redirect examination of Dr. Young:

Q. Doctor, I know your examination as a casual examination, but you will note this question: "Do you discover upon examination or inquiry any evidence of disease or functional derangement"—What is meant by functional derangement?

A. The way he breathes; talking about his respiration.

Q. In other words, that question was: "Do you discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system? If so, state particulars." Now, in such examination as you made, you directed your examination to that question as much as you could?

A. Yes, sir.

[fol. 57] Q. And you found none?

A. No, sir.

Q. At that examination, you did direct your examination to that question as much as time would permit and you found none?

A. That is right.

Recross-examination of Dr. Young:

Q. You were not especially looking for it were you?

Mr. Doyle: The question asked him to.

J. W. Dickson, a witness for the defendant, testified:

I am the general agent of the Pacific Mutual Life Insurance Company of California, in Anderson, South Carolina, and I sometimes write insurance myself, as well as the agents. I solicited Mr. Halliday's insurance application and wrote part of the agent's report, and the cashier in my office completed it for me. I talked to Mr. Halliday in 1925. As well as I recall, a mutual friend brought him to the office. As to whether, as a layman, I thought at the time he was a proper subject for insurance, I only met him that day and had never known him prior to that. I didn't notice anything unusual about Mr. Halliday that day and pursuant to that I sent him to Dr. Young for examination. They [fol. 58] issued a sub-standard policy. It is a policy rated up some, according to the nature of the impairment. They didn't issue any type of disability. He applied for dis-

ability but it was not issued. As to how much it was rated up, I don't recall that rating at all. According to the practice of the office, that rating up would depend on what the doctor found on examination, and on the doctor's statement.

Cross-examination of Mr. Dickson:

Plaintiff never paid for the policy. It was issued substandard and it was never put in force, so I never made any money on it. I don't know why he was not given the disability insurance. The company passed on that. I don't know how the Government found out about this application for insurance. That was done direct to my home office and not to me.

Redirect examination of Mr. Dickson:

I came here pursuant to a subpoena, and would not have come otherwise.

Recross-examination of Mr. Dickson:

I haven't tried to sell him insurance since.

Redirect examination of Mr. Dickson:

I was lik wise asked to produce these records.

[fol. 59] DEFENDANT'S EXHIBIT 3

Defendant's Exhibit #3 consisted of a letter from the plaintiff to the Bureau of War Risk Insurance, dated at Johnson City, Tennessee, on June 18, 1920, which reads as follows:

I hereby apply for the necessary form to be filled out by me in order that I may reinstate my insurance that was granted me by the bureau of War Risk Insurance. Upon receiving this you may consider it in force beginning July 1*th*, 1920. Soon as I receive my compensation check for the month of May 1920 will forward the necessary premium on Ten Thousand dollars. Thanking you for the past & the future I beg to remain

Yours truly, James Haskell Halliday, Vocational School, Soldiers Home, Johnson City, Tenn.

Defendant's Motion for Directed Verdict

Mr. Doyle: I will make this motion. The defendant moves the Court for a directed verdict in favor of the defendant upon the following grounds: (1) That the plaintiff has not made out a prima facie case; (2) That there is no substantial evidence upon which the jury can reasonably find that the insured became permanently and totally disabled as alleged in the complaint or at any time while the insurance, which is the subject of this action, was in force by the payment of [fol. 60] premiums; and (3) That the statute of limitations has barred the bringing of this action.

The Court: I think it is a case that ought to be submitted to the jury under the evidence here, the doctors' testimony and other witnesses stating his condition before entering the service and his condition immediately upon his return from France, and I think I will have to submit it to the jury. The motion is overruled and an exception is allowed.

Charge to Jury

The court instructed the jury as follows:

Mr. Foreman and Gentlemen of the Jury, the Court will now charge you as to the law applicable to this case and state to you the issues that are to be determined and decided by you in this case; and, in addition to that, the Court can, if he sees fit, make observations on the evidence. I think it proper to tell you that in the State Courts the Judges are precluded from making observations on the evidence or statements thereabout or conclusions, but in the Federal Court the Judges are permitted to state their views on the evidence. You are not bound by that. You must make [fol. 61] your own conclusions as to the facts brought out on the witness stand under the law as the Court gives it to you, but the Court may from time to time, as it thinks proper to do so, make certain observations as to the evidence. Let me thank you gentlemen for your coming here and serving as jurors in this case. You have listened patiently to the evidence and to the discussions that have come up in the trial of the case as to the admissibility of evidence and other matters that have come before the Court for its consideration; and now you have reached the point where your duties are about completed, and after the Court completes its charge, you will retire to your room

and find your verdict. You have had the help of two outstanding lawyers in this case. Mr. Wise, counsel for the plaintiff, is the former head of the American Legion in South Carolina. Mr. Doyle, counsel for the Government, also is the former head of the American Legion in South Carolina. They are outstanding lawyers and know the principles applicable to a case of this kind probably better than any other lawyers in the State and the Court is appreciative of their help in this matter, and I know that you as jurors have been enlightened by their arguments in the matter. In approaching this charge, let me admonish you that you are approaching the decision in this case not with any feeling of sympathy toward the plaintiff. The plaintiff might be in a decrepit condition mentally or otherwise, but you cannot let sympathy sway you in a matter of this kind. On the other hand, because the defendant is the Government in this case, you cannot let that sway [fol. 62] you. It is just as if this matter was on a contract for the purchase of a piece of land. There is not a bit of difference in this matter than if it was a contract of that kind. The soldiers in the World War carried insurance and paid for it, and some are still paying for it. The Government worked out this plan. You did not have to take a physical examination. When you went in the army and you desired to take out this insurance, you made an application and that was the end of it. Your name was entered on the roll, it was kept there, and there was deducted from your wages monthly the premium necessary to pay for this insurance which was carried. So you approach the consideration of this case without sympathy for the plaintiff and without sympathy for the defendant. It is not the Government; it is a contract of insurance in the true sense of the word, and an insurer just as much as an insurance company. That money has been set aside every year. It is kept in a separate fund. It was calculated that upon the charge of so much money, they could insure a man thirty years old, twenty-two years old, or twenty years old. That is the manner in which you will approach the case, without sympathy for the plaintiff or for the defendant, and under your oath you will find the truth and do your duty under the law that the Court will charge is applicable. Now, the plaintiff comes into court and I think in Paragraph Three of the complaint it is alleged that he

had this policy. I charge you that it was a $10,000.00 policy, and in case of permanent and total disability while the [fol. 63] policy was in full force and effect, he was to receive the sum of $57.50 per month thereafter, right up to now. This complaint says that while the plaintiff was serving in the Army of the United States he became totally and permanently disabled by reason of diseases and infirmities so that from the 2nd day of April, 1919, (remember that is your date) he was totally and permanently disabled to the extent contemplated by the contract of War Risk Insurance under the Acts of Congress and regulations relating thereto and that on account of said disability, no premiums were due to have been paid on the said contract of insurance from the date of his disability, and that the said contract was at that time and is at this time in full force and effect. The defendant, the Government, denies that and says that he was not disabled while the policy was in full force and effect, and denies that he is entitled to anything. Now, on those issues, you are to find your verdict, you are to reach a conclusion, you are to say who is entitled to your verdict in this case, the plaintiff or the defendant. Now, the plaintiff must come into court and prove these allegations by the greater weight of the evidence. By the greater weight of the evidence, I charge you that that means the proportion of the evidence that carries conviction to your minds as reasonably prudent men in the belief that the plaintiff has proved his case. They use this illustration as an easy way to carry to the minds of the jury what the Court is attempting to say. Shut your eyes, as it were, and place the evidence on the [fol. 64] scales, and whichever side goes down, that is the greater weight of the evidence. If the plaintiff's evidence is such that it proves to your minds by the greater weight thereof that the allegations have been proven, then you must find for the plaintiff. If the evidence fails to prove that, then you must find for the defendant. The greater weight is the portion of the evidence that the plaintiff must bring to you in order to recover. Now, on the question of the issues here, I must charge you what is meant in law by permanent and total disability. Now, remember that the date for your consideration is the 2nd day of April, 1919, which was the date of discharge in this case. Automatically after that, if he was permanently and totally disabled, there

was no need to pay any further premiums. You need not worry about the premiums, but consider whether or not while in the army the plaintiff was permanently and totally disabled. Now, in considering what is permanent and total disability, the Government of the United States, operating this department of the Government providing for the World War Veterans, has in its Regulation Number 11 defined what permanent and total disability means in the opinion of the Government, the defendant here. It defines total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, without [fol. 65] serious impairment to either body or mind. And it is to be deemed to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That means, to go just a little further—because that is perfectly clear,

Any impairment of mind or body from April 2nd, 1919; whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him, "If you do that, it is going to seriously impair your body or mind." I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention. Now, then, as to what is the further rule from a legal standpoint from the decisions. Remember that the contract in this case insured against two things: death and disability. Well, there was no death. In case of death, there would [fol. 66] have been paid $10,000.00 if death had occurred while the policy was in force. So in the death feature you are not concerned, because the insured is still alive. The only issue is whether or not the insured became disabled on or before the 2nd day of April, 1919. When the contract of insurance lapsed, it was reinstated, and it finally lapsed in 1920. I do not think it is necessary to be considered in this case, but you could consider up to the 20th day of Oc-

tober, 1920; whether or not the disability occurred up to that time. There was a period there that it was paid through April 30th, 1919 by virtue of the thirty days of grace. It lapsed on August 1st, 1920. He kept it up until then. Then it was reinstated and premiums were paid through September 20th. The final lapse was October 20th, 1920. You can consider the evidence through October 20th, 1920, as to whether or not the disability occurred up to that time, but the prime date is April 2nd, 1919, because that is what the complaint alleges although the other could be considered. Now, I charge you that it is proper for you to take into consideration the evidence which you have heard relating to the physical and mental condition of the insured; that is, from April 2nd, 1919, which is the date that they allege, and since, because they must continue that through the years up to 1935. All of this evidence as to his condition [fol. 67] in later years, however, is to be considered by you for the purpose of determining whether the insured became in fact permanently and totally disabled on or before April 2nd, 1919, or later in August, September, or October, 1920. If you are satisfied from the preponderance or greater weight of the evidence that the insured at any time before the 2nd day of April, 1919, or before August, September, or October, 1920, was not totally disabled, you must find and return a verdict for the defendant in this case. On the other hand, if you find that he has been totally and permanently disabled since that date, you should take that fact into consideration. I want to charge you as to what some of our Courts have held and defined as permanent and total disability. One of the outstanding cases holds, and I so charge you, that the phrase permanent and total disability in a war risk insurance policy should be construed reasonably and not unreasonably. You Gentlemen of the Jury must act reasonably in your consideration of the facts, which are to be construed reasonably, having regard to all the circumstances. Permanent disability, as used in war risk insurance policies, means that which is continuous as opposed to that which is temporary. The phrase permanent and total disability, as used in a war risk insurance policy, does not mean helplessness or complete disability, but in- [fol. 68] cludes more than that which is partial. Permanent and total disability, says another outstanding decision, is a disability which permanently precludes the plaintiff from following any substantially gainful occupation. I

think I have covered pretty largely the meaning and intention of the words permanent and total disability, and the construction given by the Government in its own bulletins, by the Courts of the State, and my own judgment of what constitutes permanent and total disability. Now, as I stated, it must begin while he was in the service or in that period which I just described to you up to October 20th, 1920, and he must show by the greater weight of the evidence that such permanent and total disability has existed. Now, that must continue through the years down to December, 1935. You will recall that this Court eliminated any testimony beyond December, 1935, because at that time he was judicially declared to be of unsound mind, and I charge you now that the solemn judgment of a court of this land, pursuant to the statutes of South Carolina, found and held this plaintiff to be insane and of unsound mind and had a committee, which is sometimes called a guardian, appointed for him to transact his business, and neither you nor I nor anyone else can go beyond a solemn judgment of a court of South Carolina declaring him to be insane. From that time [fol. 69] on he was permanently and totally disabled because of those facts, and the presumption is that he will continue so until his life ends, unless and until by some proceeding in that court or by action of the State Hospital for the Insane he is declared to be of sound mind, and that is also by a proceeding in the courts of South Carolina. Therefore, you need not consider for one minute whether after that he was totally and permanently disabled, because I charge you as a matter of law that he was. Now, Mr. Foreman and Gentlemen of the Jury, I think that covers pretty largely all the matters of law that I can give you: an explanation of the issues here and the law applicable to the case. You are going to recall that the burden of proof is on the plaintiff through the case by the greater weight of the evidence. You will recall that if that proof is here by the greater weight of the evidence as shown by the plaintiff in her case or his case, then you must find for the plaintiff. If not, you must find for the defendant. You must remember that the date alleged is the 2nd day of April, 1919, and if you find for the plaintiff, you will take this sheet of paper at the top of which you will find the form of verdict: We, the jury, find for the plaintiff and fix the date of his permanent and total disability from and after—you can, if you desire, say [fol. 70] the 2nd day of April, 1919, or you could say some

date in either August, September, or October, 1935, because the policy was in force in those three months too, but you can fix the date if you find for the plaintiff. If you find for the defendant, you will find the place here, and you will say: We, the jury, find for the defendant. In either case, sign your name as Foreman. Are there any other suggestions or any exceptions to the charge?

Mr. Doyle: Your Honor, the Government will except to that portion of your Honor's charge that the adjudication of the Probate Court in 1935 precludes further inquiry into the question of permanent and total disability, because I know of no decision to that effect.

The Court: I am glad for you to do that, because it is a very important question. I am glad for an exception to be taken and allowed.

Mr. Wise: May it please the Court, this regulation Number 11, I think where the fact is that in 1935 he was adjudicated to be insane, that might go as a question for the jury as to the latter part of that definition that it is deemed to be permanent. I don't think they can find a verdict unless it is deemed to be permanent. The fact that he did have this committeeship would make it reasonably certain [fol. 71] that it would continue. I would like that explained to the jury.

The Court: Under Regulation Number 11 of the Government, they have defined a case to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That, of course, was covered by my general charge and by the specific language I used. I charge you that until the judgment of the Probate Court of Anderson County is relieved by some proceeding directly in that Court or otherwise that would find that he was not permanently and totally disabled, as a matter of law he is permanently and totally disabled and it will continue until death; that he is permanently and totally disabled and that it will continue until his death.

Mr. Doyle: I may be wrong, but is there also a presumption that a man is sane until he is proven insane?

The Court: I don't think there is any such presumption. I have never heard of it. The plaintiff has made the issue here and you joined issue here on that very point, and that is your evidence to be presented to the jury.

Mr. Doyle: But that is some evidence that the jury may take into consideration.

The Court: This Court will not charge that that is some evidence. The plaintiff does not allege insanity in his com-[fol. 72] plaint. He alleges that by reason of disease and infirmities he was permanently and totally disabled from the 2nd day of April, 1919.

Mr. Doyle: Yes, sir, but he has argued to the jury.

The Court: He has argued it according to the way the doctors testified and he has attempted to prove it. I think those issues are clear. I think you Gentlemen of the Jury understand them. It is very simply boiled down in the final analysis of the case. You may take this record, the complaint and the answer, and write your verdict as you find it on the sheet of paper which I will put there. You can retire to your room Gentlemen, and when you reach a verdict you can advise the Marshal and he will advise the Court.

VERDICT

The jury retires. After deliberating, the following verdict is returned by the jury: We, the jury, find for the plaintiff and fix the date of his permanent and total disability from and after the 2nd day of April, 1919.

The jury is excused.

A motion for a new trial is noted by Mr. Doyle.

[fol. 73] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO THE STATEMENT OF THE EVIDENCE

It is hereby agreed and stipulated by and between the undersigned counsel for appellant and appellee herein that the foregoing statement of the evidence, including pages numbered 6 to 72 of this transcript of the record on appeal, comprises a true, full, and complete statement of all of the evidence introduced at the trial of this action and of the court's charge to the jury, necessary for consideration of the questions involved on this appeal.

This 2 day of Oct. 1940.

O. H. Doyle, United States Attorney, Counsel for Appellant. R. K. Wise, Counsel for Appellee.

[fol. 74] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR A NEW TRIAL—Filed February 20, 1940

This case was tried before me at Anderson, South Carolina, on November 30, 1939. The plaintiff was represented by R. K. Wise, Esquire, of Columbia, S. C., and the defendant by O. H. Doyle, United States Attorney, and E. P. Riley, Assistant United States Attorney, and the trial resulted in a verdict for the plaintiff. A motion for a new trial was made and was argued before me in Columbia, South Carolina, on February 26, 1940.

I am of the opinion that there was ample evidence to go to the jury in this case. The Government records showed that the veteran was not in good physical condition when he was discharged from the Army. He was given vocational training at Waynesville, N. C., and at the University of Georgia, but the testimony was and the record showed that his training was frequently interrupted on account of his physical and mental condition. The veteran's wife, who is his committee, and who was a school teacher prior to their marriage in 1921, made a very impressive witness. She testified that the veteran was in bad physical condition and extremely nervous even before their marriage in 1921; [fol. 75] that soon after their marriage she discovered that the veteran was mentally unbalanced, that he was suspicious of her and all the neighbors, was afraid that someone would poison him, and he threatened to kill her and all of the children and commit suicide. Several of the neighbors testified that the veteran appeared to be sick, was very contentious and suspicious, and was on bad terms with all of his neighbors.

Dr. J. N. Land testified that he had known the veteran since he was a boy; that he had been the physician of his mother's family before the War and had seen the veteran quite regularly since he returned from the Army; that he had considered him both physically and mentally unfit for work since his discharge; and that any sustained effort would, in his opinion, have brought about a complete collapse of the veteran physically and mentally.

The Government offered little testimony to offset the plaintiff's case other than the testimony of Dr. C. H. Young.

who examined and passed the veteran for a life insurance policy. But, on cross examination, Dr. Young admitted that he had made no mental examination of the veteran and that in such an examination as he made it would not be unusual for him to overlook the veteran's mental condition, [fol. 76] and that one might easily conceal the fact that he was mentally deranged on such an examination. The Agent who represented the insurance company for which Dr. Young had made the examination testified that a sub-standard policy was issued to the veteran and that it was not accepted by him.

I am of the opinion that the jury returned a proper verdict in this case and I am convinced that if a new trial were granted, another jury would come to the same conclusion. It is, therefore,

Ordered, That the motion for a new trial be and the same is hereby overruled.

(Signed) Alva M. Lumpkin, United States District Judge.

Columbia, S. C., February 27, 1940.

[fol. 77] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed April 18, 1940

This cause came on regularly to be heard on November 30, 1939; R. K. Wise, Esquire, appearing for the plaintiff; Honorable Oscar H. Doyle, United States Attorney for the Western District of South Carolina, attorney for defendant; that a jury of twelve persons was regularly impaneled and sworn to try the said cause. Witnesses on the part of plaintiff and defendant were sworn and examined with reference to the action herein upon a certificate of insurance issued by the defendant to James H. Halliday, a soldier of the World War, providing that in the event of his permanent and total disability while his insurance was in force, that he would be paid by the defendant the sum of Fifty Seven and 50/100 ($57.50) Dollars per month throughout the period of such disability; that after hearing the evidence and the instructions of the Court the jury retired to consider their verdict,

and subsequently returned into Court their verdict in words and figures as follows: to wit:

"We the Jury find for the plaintiff and fix the date of his permanent and total disability, from and after April 2, 1919.
[fol. 78] (S.) Mark Toney, Foreman.

Dated: November 30, 1939."

And the Court having fixed plaintiff's attorney fees in the amount of ten percentum of the insurance sued upon and involved in this action. Therefore, on motion of R. K. Wise, attorney for plaintiff:

It Is Ordered, Adjudged And Decreed that the plaintiff have judgment against the defendant for monthly installments at the rate of Fifty Seven and 50/100 ($57.50) Dollars, for each and every month beginning April 2, 1919, up to and including November 2, 1939, monthly anniversary date immediately preceeding the trial of said cause of action.

And It Is Further Ordered, Adjudged And Decreed that the defendant, the United States of America, deduct ten percentum (10%) of the amount of insurance sued upon and involved in this action and pay the same to R. K. Wise, Columbia, S. C., plaintiff's attorney, for his services rendered before this Court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments which may hereafter become due pursuant to this judgment, said amounts to be paid by the defendant to the [fol. 79] said R. K. Wise out of any payments to be made to James H. Halliday, a person non compos mentis, his Committee, beneficiary or estate, in the event of his death before Two Hundred and Forty (240) of said monthly installments have been paid.

Alva M. Lumpkin, United States District Judge.

Signed: April 18th, 1940.

Approved as to Form.

O. H. Doyle, United States Attorney, For the Defendant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 16, 1940

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final Judgment entered in this action on April 18, 1940.

(Signed) O. H. Doyle, United States Attorney, Attorney for Appellant, United States of America.

Greenville, S. C., July 16, 1940.

[fol. 80] IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed Oct. 10, 1940

To: R. K. Wise, Esquire,
Attorney for the Plaintiff-Appellee herein

You Will Please Take Notice That the defendant herein will ask the United States Circuit Court of Appeals for the Fourth Circuit to reverse the judgment heretofore entered in this action upon the following grounds, to-wit:

I

Because the District Court erred in failing and refusing to grant defendant's motion for a directed verdict made at the close of all the evidence upon the ground that there was no substantial evidence that the plaintiff was permanently totally disabled as alleged. (R. 59-60.)

II

Because the District Court erred in its ruling, over the defendant's objection, excluding all evidence relating to the condition of the insured subsequent to December 1935. (R. 12-19.)

III

Because the District Court erred in instructing the jury, over the defendant's objection made in the presence of the jury, that—

[fol. 81] * * * I charge you now that the solemn judgment of a court of this land, pursuant to the statutes of

South Carolina, found and held this plaintiff to be insane and of unsound mind and had a committee, which is sometimes called a guardian, appointed for him to transact his business, and neither you nor I nor anyone else can go beyond a solemn judgment of a court of South Carolina declaring him to be insane. From that time on he was permanently and totally disabled because of those facts, and the presumption is that he will continue so until his life ends, unless and until by some proceeding in that court or by action of the State Hospital for the Insane he is declared to be of sound mind, and that is also by a proceeding in the courts of South Carolina. Therefore, you need not consider for one minute whether after that he was totally and permanently disabled, because I charge you as a matter of law that he was. (R. 68-69, 70-72.)

Oscar H. Doyle, United States Attorney, By ——, Assistant United States Attorney, Counsel for Appellant.

September 1940.

Service accepted this 2 day of October 1940.
R. K. Wise, Attorney for Plaintiff-Appellee.

[fols. 82-83] In United States District Court

Order Extending Time for Docketing and Filing Record on Appeal—Filed Aug. 16, 1940

Upon motion of O. H. Doyle, United States Attorney for the Western District of South Carolina, at the request of the Director, Bureau of War Risk Litigation.

It Is Ordered: That the time for docketing and filing record on appeal in the above entitled case be, and the same is hereby, extended for a period of fifty days from August 25, 1940.

Alva M. Lumpkin, U. S. District Judge.

Columbia, S. C., August 15, 1940.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4714

UNITED STATES OF AMERICA, Appellant,

versus

JAMES H. HALLIDAY, a Person Non Compos Mentis, by His Committee, ANNIE HALLIDAY, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Anderson

DOCKET ENTRIES

October 12, 1940, the transcript of record is filed and the cause docketed.

Same day, the original exhibits are certified up.

October 15, 1940, the appearance of O. H. Doyle, U. S. Attorney, is entered for the appellant.

Same day, order extending the time for a period of fifty days from August 25, 1940, for docketing and filing record on appeal is filed.

October 17, 1940, the appearance of Julius C. Martin, Director, Bureau of War Risk Litigation; Wilbur C. Pickett, Special Assistant to the Attorney General, and Fendall Marbury, Special Attorney, Department of Justice, is entered for the appellant.

October 21, 1940, affidavit of appellee as to poverty is filed.

[fol. 85] ORDER PERMITTING APPELLEE TO DEFEND APPEAL *in Forma Pauperis*—Filed October 21, 1940

Upon the Application and Affidavit of the Appellee, by R. K. Wise, his attorney, for permission to defend the appeal in the above entitled case in this Court *in forma pauperis.*

It Is Ordered that the appellee be, and he is hereby permitted to defend his appeal in the above case in this Court *in forma pauperis*, and he is further permitted to file six

typewritten copies of his brief instead of twenty-five printed copies as required by the rules of this Court.

October 21, 1940.

John J. Parker, Senior Circuit Judge.

Same day, to-wit, October 21, 1940, the appearance of R. K. Wise is entered for the appellee.

October 22, 1940, stipulation as to the time for the filing of the respective briefs is filed.

Same day, notice of parts of the record appellant proposes to print with its brief is filed. Service accepted.

November 4, 1940, the appearance of Warren E. Miller is entered for the appellee.

November 8, 1940, brief on behalf of appellant is filed.

Same day, twenty-five copies of supplement to appellant's brief are filed.

[fol. 86] November 18, 1940, brief on behalf of appellee is filed.

ARGUMENT OF CAUSE

November 23, 1940, (November term, 1940) cause came on to be heard before Soper and Dobie, Circuit Judges, and Chesnut, District Judge, and was argued by counsel and submitted.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4714

UNITED STATES OF AMERICA, Appellant,

versus

JAMES H. HALLIDAY, a Person Non Compos Mentis, by His Committee, ANNIE HALLIDAY, Appellee

Appeal from the District Court of the United States for Western District of South Carolina, at Anderson

(Argued November 23, 1940. Decided January 9, 1941)

Before Soper and Dobie, Circuit Judges, and Chesnut, District Judge

Fendall Marbury, Attorney, Department of Justice, and Oscar H. Doyle, U. S. Attorney, (Julius C. Martin, Direc-

tor, Bureau of War Risk Litigation; and Wilbur C. Pickett, Special Assistant to the Attorney General, on brief) for Appellant, and Warren E. Miller and R. K. Wise for Appellee.

OPINION—Filed January 9, 1941

[fol. 88] DOBIE, Circuit Judge:

This was an action on a war risk insurance policy, brought by James H. Halliday (hereinafter called the insured), who sued through his Committee, Annie Halliday, to recover total permanent disability benefits under his term policy, which was issued between June 23, 1918, and April 2, 1919, while he was in the military service of the United States.

In his complaint, filed November 20, 1936, insured alleged that he had been totally and permanently disabled since April 2, 1919, the date of his discharge from the army. Insured's policy, which had lapsed for non-payment of premiums, was reinstated on August 1, 1920, and premiums were paid which carried the policy, including the grace period, to October 31, 1920. Accordingly, the issue submitted to the jury was whether insured was totally and permanently disabled before October 31, 1920.

At the close of the case, the Government moved the court to direct a verdict in its favor upon the ground that there was no substantial evidence that the plaintiff was permanently and substantially disabled at any time while the insurance was in force. This motion was overruled by the court. Thereafter, the jury rendered a verdict for the insured and fixed April 2, 1919, the date of the insured's discharge from the army, as the date of his total and permanent disability. Judgment was accordingly entered in favor of the insured. The Government strenuously objected to some of the instructions given by the trial judge and to certain of his rulings on the admissibility of evidence. Since we believe that the lower court should have directed a verdict in favor of the Government on the ground that there was not substantial evidence of total and permanent disability to go to the jury, it is not essential that we pass on the other questions involved in this case.

After a careful survey of the record, we are forced to the conclusion that there was no substantial evidence to prove [fol. 89] that the insured was totally and permanently dis-

abled on or before October 31, 1920. We therefore proceed to a brief survey of this evidence.

Insured introduced only one medical witness, Dr. J. N. Land. Dr. Land did testify:

"I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him."

This testimony, however, has little probative force. Dr. Land testified that he had not examined the insured "physically until about six years ago",—more than thirteen years after the expiration of the policy. He further stated that he had seen the insured only a very few times before that date: "I would say I saw the man at least two or three times a year, possibly more." As Dr. Land testified, he would see the insured on the streets or in a drug store. On these occasions when the insured sought help and advice of the doctor, the doctor stated: "He was not my patient. I simply shunted him off and got away from him as best I could." In other words, Dr. Land did not see the insured professionally on the few occasions when Dr. Land came into contact with the insured, prior to the doctor's employment by the insured six years before the trial. Dr. Land testified further that insured was neurasthenic and a hypochondriac; but he admitted that he was a general practitioner and in no sense an expert or specialist in mental diseases.

Insured's wife testified that she had married him in April, 1921. She testified further that prior to their mar- [fol. 90] riage, insured had come to see her from his home, about eighteen miles away, or from the hospital where he was taking treatment. Insured, according to his wife's testimony, was at the time of their marriage, far from well and complained constantly of his stomach, heart and kidneys. She said, too, that farm work upset his nerves and stomach. She did marry him, however, and bore him four chil-

dren. Two of insured's brothers also testified on his behalf. The testimony of the brothers was far from convincing on the question of insured's total and permanent disability. One brother testified that the insured was never "able to make a full week". The other brother testified that he had "not seen him (insured) do any successful work since he was discharged".

There were several other lay witnesses testifying for insured but the testimony of these witnesses was utterly lacking in definiteness. Thus, Mr. Leverett testified: "When he (insured) returned, he seemed to be a man that didn't have a grip on himself. It was nervousness of some kind." Mr. Jackson stated: "I would say that for the last ten or twelve years he has seemed to be very nervous * * * I have had no opportunity to see him at his farm nor to know whether he did any work." Other lay witnesses testified along the same general line.

There were numerous examinations of insured by government physicians from April 12, 1920, to April 11, 1935. These reports showed that insured's tuberculosis had been arrested and no note was made in these reports of any positive mental or nervous disorder on the part of insured until February 14, 1921. In one of these reports, dated December 17, 1924, we find: "Mental Examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis. Findings of Board: It is our opinion that claimant has an industrial disability of fifteen (15) per cent from tuberculosis, chronic pulmo- [fol. 91] nary, minimal involvement, apparently arrested. There is no N. P. (neuro psychopathic) disability".

In 1925, insured applied for an ordinary life insurance policy, with a provision for total permanent disability benefits, in the Pacific Mutual Life Insurance Company. Insured represented to that Company's doctor, who examined him, that he was then in good health. On the basis of this examination, the doctor recommended that the policy applied for be issued to the insured. The Company issued a sub-standard policy to Halliday, though he never accepted and paid for this policy. This doctor stated that he did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system". He also testified that if there had been

anything noticeable in the conduct of insured, he would have noted it in his report.

Insured's wife testified further that insured's condition did not improve after he was married and that he had threatened to commit suicide and kill her and the children; and that she had left him several times and stayed with her mother until he "would get a little better". But, as she testified, she had "never requested that he be sent to any mental hospital because he did not want to be", although she "thought it would be a good thing". She stated that she had been appointed Committee for the insured on December 19, 1935, when he was formally adjudged non compos mentis, and that he had been sent to a mental hospital in 1936 and had stayed in this hospital only about thirty days. There was testimony by several witnesses that the plaintiff had pursued a course of vocational training in agriculture after his discharge from the army and that he had to some extent engaged in farming. After insured had ended his vocational training, he rented a fifty acre farm upon which he did some work and later he bought a farm of seventy-three acres, on which he was living with his family at the time this case was tried.

Even if insured had been disabled at any time before [fol. 92] the expiration of his war risk policy on October 31, 1920, due to mental or nervous disease, there is no substantial evidence to show that his nervous or mental disorder brought about disability that was either total or permanent. It was aptly stated by Circuit Judge Gardner in *U. S.* v. *Kiles*, 70 F. (2d) 880, 883 (C. C. A. 8th.):

"Passing for the moment the question of the probative force of the testimony of the lay witnesses, and assuming that it was sufficient to show that the insured was suffering from mental derangement or insanity, still it does not appear what kind or degree of insanity afflicted the insured. That term is a very uncertain, ambiguous, and flexible one, and both legal and medical authorities recognize that there are different kinds and degrees of insanity. (Rodney v. Burton, 4 Boyce (27 Del.) 171, 86 A. 826; Clarke v. Irwin, 63 Neb. 539, 83 N. W. 783; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231); that the disease is as varied in intensity and shades of difference as is human character (Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612; 4 S. Ct. 533, 28 L. Ed. 536; Denson v. Beazley, 34 Tex. 191). It may be total,

complete, general, or partial in character, and it may be either permanent or temporary in duration. State v. Jack, 4 Pennewill (Del.) 470, 58 A. 833. So, while insured's mental affliction totally disabled him, it may nevertheless have been curable and temporary in duration, and it must be remembered that the insured did not die from this affliction. In the absence of proof as to its character, we cannot presume that the affliction was permanent."

In this connection, we might also note insured's failure to secure adequate hospitalization when this would have been available to him in a government hospital. It thus becomes highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp. See the cases (all decided by this Court) of *Mikell* v. *U. S.*, 64 F. (2d) 301; *U. S.* v. *Ennis*, 73 F. (2d) 310; *U. S.* v. *Marsh*, 107 F. (2d) 173; *Neely* v. *U. S.* (decided November 12, 1940).

[fol. 93] Although it no longer becomes necessary for the purposes of this opinion to consider the correctness of the District Judge's rulings on the evidence, we do feel that one of these rulings was of such importance as to merit our present consideration. The District Judge announced early in the trial that no evidence would be admissible as to the insured's condition subsequent to December 9, 1935, the date on which the county Probate Court had adjudged the insured as of unsound mind and had appointed his wife as committee for him; that the admission of such evidence would constitute a collateral attack on a judgment which, the District Judge ruled, could not properly be subjected to such an attack. We believe that in this ruling the trial judge fell into error.

The adjudication of a probate court that the insured was insane was, as against persons not parties or privies to the lunacy proceedings, only prima facie evidence of the insured's actual insanity on the date of adjudication. See *Viccioni* v. *United States*, 15 F. Supp. 547, 549-550 (D. R. I. 1936); cf. *Cathcart* v. *Matthews*, 105 S. C. 329, 343, 89 S. E., 1021, 1026 (1916). See, also, *Hall* v. *Aetna Life Ins. Co.*, 85 F. (2d) 447, 451 (C. C. A. 8th, 1936); *Chaloner* v. *New York Evening Post Co.*, 260 Fed. 335, 337 (C. D. N. Y. 1919); *Johnson* v. *Pilot Life Ins. Co.*, 217 N. C. 139, 143, 7 S. E. (2d) 475, 477 (1940). Furthermore, this finding of the probate court, even if it be treated as conclusive evi-

dence as against the Government, should not be absolutely controlling in the instant case. The problem here is different from the one involved in the probate court; for the state of mind sufficient to secure an adjudication of "insanity" in an informal and ex parte proceeding in a probate court, is not necessarily, and often is not actually, sufficient to constitute disability that is both total and permanent. The instant case hinges upon the proof of a disability of mind far more serious than that required to be proved in a proceeding before the probate court. The probate court's [fol. 94] prior adjudication is only of evidential value in determining the total and permanent disability of a claimant under a war-risk policy; the adjudication is not conclusive, but it must be considered along with all the other relevant evidence for a determination in the District Court of whether or not the claimant is actually suffering from a total and permanent disability. See *Viccioni* v. *United States*, *supra*, 15 F. Supp. at pp. 549-550.

As we have indicated, the Government's motion for a directed verdict at the close of the evidence was denied in the District Court without any express reservation of decision. The Government did not later move to have the ultimate verdict and judgment set aside and for the entry by the District Court of judgment in favor of the Government notwithstanding the verdict. The Government did file a motion for a new trial, which was overruled. Yet we still believe we have power to direct that such judgment in favor of the Government be entered in the District Court. Under the *Federal Rules of Procedure* 50 (b), "Whenever a motion for a directed verdict made at the close of all the evidence is denied * * *, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." The denial of the original motion for a directed verdict, it seems, is now treated as the equivalent of a reservation by the District Court. Accordingly, we believe that the Government's failure to move in the court below for judgment in its favor notwithstanding the verdict does not restrict our power in the premises. See *Conway* v. *O'Brien*, 111 F. (2d) 611, 613 (C. C. A. 2d, 1940). Also, cf. *Eastern Livestock Co-Operative Marketing Ass'n, Inc.* v. *Dickenson*, 107 F. (2d) 116, 120 (C. C. A. 4th, 1939); *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8th, 1940). And see the remarks of Hon. William D. Mitchell, Chairman of the United

[fol. 95] States Supreme Court's Advisory Committee on the Federal Rules of Civil Procedure, *Federal Rules of Civil Procedure* and Proceedings of the American Bar Association Institute, Cleveland, 1938, at page 315:

"We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action."

Compare, too, *Brunet* v. *S. S. Kresge Co.*, (C. C. A. 7, decided November 20, 1940); *Willis* v. *Pennsylvania Ry. Co.*, (E. D. N. Y., decided December 5, 1940); *Montgomery Ward & Co.* v. *Duncan*, (U. S. Sup. Ct., decided Dec. 9, 1940).

Rule 50 (b) of the *Federal Rules of Civil Procedure* does specifically provide: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict". The rule also declares: "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative". Then follow, in the rule, provisions as to the powers of the trial judge under these motions. We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of *Baltimore & Carolina Line* v. *Redmon*, 295 U. S. 654, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though [fol. 96] the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50(b)) in the lower court a motion, after the verdict, "to have judgment entered in accordance with his motion for a directed verdict."

The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment in favor of the United States, appellant-defendant.

Reversed.

[fol. 97] In United States Circuit Court of Appeals, Fourth Circuit

No. 4714

United States of America, Appellant,

vs.

James H. Halliday, a person non compos mentis, by his Committee, Annie Halliday, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

Judgment—Filed and Entered January 9, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina, at Anderson, with directions to set aside the verdict and to enter judgment in favor of the United States of America, appellant, in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge.

January 9, 1941.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Presented February 7, 1941

Comes now appellee in the above entitled cause, by counsel, and respectfully petitions this Honorable Court for a rehearing in this cause, and as grounds therefor states:

1. That portion of the opinion of this Court which remanded this case to the Court below with directions to enter judgment in favor of the United States involves a question [fol. 99] now pending before the United States Supreme Court in two cases, No. 336, in that Court, entitled *Leroy A. Berry, petitioner*, v. *United States of America, respondent*, and *Conway* v. *O'Brien*, No. 344, which were argued in that court on February 4, 1941, and February 5, 1941, respectively.

In those cases, as in the instant case, the Circuit Court of Appeals for the Second Circuit directed the District Court to take action which precludes a new trial. After the decisions by the United States Supreme Court in these two cases, this Court may wish to modify or change that portion of its opinion directing the lower court to enter judgment in favor of the United States.

By granting this petition for a rehearing this Court will probably decrease the burden of work in the United States Supreme Court, because the decisions of the United States Supreme Court in the *Berry* and *Conway* cases will certainly be controlling here. If contrary to the decision of this court they will be controlling here and this court will want to change its opinion to conform therewith; and if they sustain the action of the Second Circuit Court of Appeals, they will in effect preclude this appellee from asking the United States Supreme Court for a writ of *certiorari*. However, if this court does not grant a rehearing, it may be incumbent upon this appellee in order to preserve her rights pending the decisions of the United States Supreme Court in the *Berry* and *Conway* cases to apply for a writ of *certiorari* to the United States Supreme Court. All of this may be averted and this court will be privileged to correct its own opinion should the United States Supreme

Court reverse the *Berry* and *Conway* cases, without the necessity of asking that court to hear and decide the instant case.

2. There is pending in the United States Supreme Court a war risk insurance case which was argued on February 4th, 1941, wherein one of the questions presented is whether [fol. 100] the petitioner adduced sufficient evidence at the trial of his cause to sustain the verdict of the jury. That court will undoubtedly establish some definite rule of law which may be quite pertinent when applied to the facts in the instant case, and the decision of that court pertaining to the question of permanent and total disability may be such that this court would welcome an opportunity to change its opinion as to that phase of the instant case. That is one of the same cases mentioned above, the case of *Berry* v. *United States*, No. 336, in the Supreme Court of the United States.

3. At the time of the argument of this case before this court the question of the power of this court to direct, under the state of the record now before this court (absent a motion for judgment *non obstante veredicto*), that judgment be entered in favor of the Government in the District Court, was not argued by counsel or developed by the court. This question, which goes to the very vitals of the foundation of the fundamental principles of the law of the land, is too important to be passed upon thus lightly and without this court having the benefit of full argument by counsel for the respective parties.

By granting this motion this court can carefully reflect upon the far reaching effect of its decision and avail itself of the decision of the United States Supreme Court before finally passing upon this all important point of law. This, it is respectfully submitted, is the logical and correct procedure for this court to follow, and we respectfully urge it.

4. In the instant case appellant did not move to set aside the verdict as required by rule 50 (b). Therefore, this court was without authority to order that judgment be entered in favor of the United States as the case falls squarely [fol. 101] within and is contrary to the rule laid down by the United States Supreme Court in the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, holding that a new trial must be granted under

similar circumstances. There is quoted below the headnot of the *Slocum* case which gives a succinct statement of the decision of the United States Supreme Court in that case:

"A circuit court of appeals, when reversing a judgment of the circuit court, entered on a general verdict in favor of plaintiff, because of error in refusing to instruct the jury that the evidence was insufficient to sustain a verdict for plaintiff, cannot direct, although in accordance with the state practice, as defined in Pa. Laws 1905, chap. 198, that judgment on the evidence be entered contrary to the verdict, but must award a new trial, in order to conform to the provisions of U. S. Const., 7th Amend., that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Appellant here did no more than was done by the respondent in the *Slocum* case and should have ordered a new trial. In this manner substantial justice will be done.

We respectfully submit that in effect this court has weighed the evidence to determine whether the evidence preponderates for or against this plaintiff. That responsibility under the Seventh Amendment lies solely with the jury. *United States* v. *Dudley*, 64 Fed. (2d) 743.

5. The decision of this court is also contrary to the decision of the United States Supreme Court in the case of *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, which [fol. 102] dealt with the state practice after which rule 50 (b) was modelled. In that case that court held:

"The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwith-

standing the verdicts plaintiff was entitled to recover. *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, 387, 57 L. Ed. 879, 889, 33 S. Ct. 523, Ann. Cas. 1914 D 1029. Our decision in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, 55 S. Ct. 890, is not applicable."

6. The interpretation placed by this court upon Rule 50 (b) defeats the purpose of the Rule. Rule 50 (b) provides an instrumentality by which, without loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be re-examined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660), "came to be supported on the theory that it gave better opportunity for considered rulings". It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule, viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better opportunity" to make the ruling in advance of the appeal. As [fol. 103] Rule 50 (b) is interpreted by the decision of this court, the purpose of this rule is for the benefit of the Circuit Court of Appeals and not the District Court. This was never the intention of this rule. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad.

The appellant did not seek a judgment *non obstante veredicto* in the District Court, nor did the District Court consider the entry of one. By its decision in this case this court attributes error to the District Court in failing to do that which the District Court was not asked to do.

7. This court violated the general common law relating to trials by jury and denied trial by jury to appellee in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon

which the jury might find, (as it did) that the insured was permanently and totally disabled.

8. This court in its opinion in the instant case apparently cites as its authority the case of *Conway* v. *O'Brien*, 111 Fed. (2d) 611, 613 (C. C. A. 2nd 1940). In that case the Supreme Court of the United States granted a writ of *certiorari* upon the identical question passed upon here.

It was the privilege of one of counsel for appellee here, who had the next case following the case of *Conway* v. *O'Brien* in the United States Supreme Court when that case was argued on February 5, 1941, to hear the argument of counsel and remarks of the Justices of the United States [fol. 104] Supreme Court in both the *Conway* and *Barry* cases. The *Barry* case was set for argument just preceding the *Conway* case. It was assumed by the Justices of the United States Supreme Court during these arguments that if there had been no Rule 50 (b) under the *Redman* and *Slocum* cases the Second Circuit Court of Appeals would have had no authority to do other than reverse and remand for a new trial because there was no reservation by the District Court in both the *Barry* and the *Conway* cases. The same situation prevails in the instant case.

Counsel for the appellee here predict that the United States Supreme Court will reverse the Second Circuit in both the *Barry* and the *Conway* cases.

If the United States Supreme Court does this, by this court now granting appellee's motion for a rehearing in the instant case this court may thus obviate the necessity of appellee asking for a writ of *certiorari* in the instant case and thus avoid the necessity of having the United States Supreme Court reverse the action of this court in the instant case. By deferring action on this motion for a rehearing until the Supreme Court acts in the *Barry and Conway* cases this court may properly avail itself of the opportunity to avoid a reversal by the United States Supreme Court.

During the argument of the *Conway* case reference was made by the United States Supreme Court to the decision of this court in the instant case and counsel representing petitioner in the *Conway* case pointed out to the United States Supreme Court that in the cases cited by this court in support of its decision, investigation disclosed that there was no motion ever made for judgment after verdict as

provided in Rule 50 (b) and hence these decisions were not authority for the ruling of this court in the instant case.

Counsel for this appellee believe that when the records in each of these cases are examined that this will be found [fol. 105] to be a fact. There is not time now to permit counsel to personally make this investigation, but we are certain that counsel in the *Conway* case would not have made this statement in arguing before the United States Supreme Court if they had not made the investigation.

Upon a new trial, appellee may well supply the defects, if any, in the testimony sufficiently to prove permanent and total disability in the instant case. It is respectfully submitted that she should be given that right and is entitled when, upon a hearing this court grants her a new trial for that purpose.

Wherefore, appellee prays that this motion for a rehearing be granted and upon such rehearing this court reconsider its action and either affirm the action of the District Court or grant appellee a new trial.

Respectfully submitted, R. K. Wise, Columbia, South Carolina, Warren E. Miller, Washington, D. C., Attorneys for Appellee.

[fol. 106] February 12, 1941, motion of appellee for a stay of mandate pending petition for rehearing is filed.

February 17, 1941, order staying mandate pending action of the Court on petition of appellee for rehearing is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 10, 1941

This Court having at its January Term, 1941, rendered its decision reversing the judgment of the said District Court appealed from, and the appellee having on February 7, 1941, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered By This Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of 5 days from this date.

March 10, 1941.

Armistead M. Dobie, U. S. Circuit Judge.

[fol. 107] March 15, 1941, motion of appellee for stay of mandate pending application for writ of certiorari is filed.

In United States Circuit Court of Appeals

Order Staying Mandate Pending Application for Writ of Certiorari—Filed and Entered March 15, 1941

Upon the Application of the Appellee, by his attorneys, R. K. Wise and Warren E. Miller, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

March 15, 1941.

John J. Parker, Senior Circuit Judge.

In United States Circuit Court of Appeals

Order Authorizing Clerk to Use Original Transcript of Record in Making up Record for Use in the Supreme Court of the United States on Application for Writ of Certiorari

For Reasons Appearing to the Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in [fol. 108] this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] Supreme Court of the United States, October Term, 1941

No. 101

Order Allowing Certiorari—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

[fol. 110] Supreme Court of the United States, October Term, 1941

No. 101

Order Granting Motion for Leave to Proceed in Forma Pauperis—October 13, 1941

On Consideration of the motion for leave to proceed further herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration and decision of this motion.

Indorsed on cover: In forma pauperis. File No. 45,428. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 101. James H. Halliday, a Person Non Compos Mentis, by his Committee, Annie Halliday, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 22, 1941. Term No. 101, O. T., 1941.

(7102)